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No. _____

In the

Supreme Court of the United States

October Term, 1997

YVETTE FARMER,
Petitioner,

v.

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA,
Respondent.

Petition for Writ of Certiorari to the Nevada Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Title VII of the Civil Rights Act of 1964, as amended, permit employers to take race into account for purposes other than remedying past discrimination?

2. May an employer use a race based hiring scheme to refuse to hire a woman, a member of a protected class under Title VII, and later hire that woman and discriminate against her in her compensation in order to promote an undefined goal of "diversity"?

PARTIES TO THE PROCEEDING

The petitioner (plaintiff-respondent in the courts below) is Yvette Farmer.

The respondent (defendant-appellant in the courts below) is the University and Community College System of Nevada.

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INTRODUCTION

"Does Title VII of the Civil Rights Act of 1964, as amended, permit employers to take race into account for purposes other than remedying past discrimination?" This question was accepted by this Court in *Piscataway Township Board of Education v. Taxman*, 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997). Although a last minute settlement removed the *Taxman* case from this Court's calender, this important question is presented here. The Third Circuit Court of Appeals answered this question in the negative. *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547. In this case, the court below rejected the reasoning of the Third Circuit and answered this question in the affirmative, allowing the University of Nevada at Reno (University) to make employment decisions based on race in order to diversify its faculty.

The question of to what extent, if any, racial preferences can be used to achieve the amorphous goal of racial diversity is causing a great deal of confusion among the lower courts. A decision in this case regarding the permissible use of race in employment decisions can only clarify this unsettled area of the law. Petitioner, Yvette Farmer, requests this Court to grant the petition for writ of certiorari to resolve the issue of whether Title VII permits an employer to take race into account for purposes other than remedying prior discrimination.

OPINION BELOW

The decision of the Nevada Supreme Court is reported at 930 P.2d 730 (1997), and is reproduced as Appendix (App.) A. Page references are to the version in the Appendix.

JURISDICTION

The complaint in this action was filed in the Second Judicial District Court of the State of Nevada, County of Washoe, alleging, among other things, a violation of Title VII of the Civil Rights Act of 1964, as amended. A jury returned a verdict in petitioner's favor. An appeal was filed timely. The decision of the Nevada Supreme Court was entered January 3, 1997. Petitioner filed a timely petition for rehearing that was denied on November 21, 1997. App. B-1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(2)a provides:

> **§ 2000e-2. Unlawful employment practices**
>
> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such

individual's race, color, religion, sex, or national origin.

The Equal Pay Act, 29 U.S.C. § 206(d)(1), provides:

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

STATEMENT OF THE CASE

This case asks the question of whether a public employer may discriminate on the basis of race and gender under the guise of seeking to achieve a racially diverse faculty. This is a case of egregious discrimination against petitioner, Yvette Farmer, where the government initially refused to hire her and then paid

her substantially less than a minority colleague because she was white. Unlike this Court's more recent cases involving race and gender based preferences "this is not a case of remedial affirmative action." App. A-14 n.2 (Springer, J., dissenting).

The University adopted an unwritten minority bonus preference policy allowing each department to hire an additional faculty member for every minority candidate hired. App. A-2. In 1990, the University announced an opening in its sociology department. Yvette Farmer, a white female, and Johnson Makoba, a black male who had recently emigrated from Uganda, were two of the three finalists. App. A-2. Although Farmer asserted on appeal that the record established she was more qualified for the position, the court below found that Farmer and Makoba "were equal in most respects." App. A-7. The University's hiring guidelines require departments to interview more than one candidate; however, this procedure may be waived. App. A-2. Based on the race of the candidates, the sociology department sought and obtained a waiver allowing it to interview only Makoba. App. A-2. Makoba was hired and was paid a premium over and above the advertised salary for the position. App. A-3.

One year later, as a result of the unwritten minority bonus preference policy that allows each department to hire an additional faculty member, Yvette Farmer was hired. App. A-3. The University, however, continued to discriminate against her. Although Johnson Makoba and Yvette Farmer were hired to perform the same task, teaching sociology, the University paid Makoba a starting salary of $35,000 with a $5,000 increase after the completion of his dissertation. *Id.* Makoba's initial salary exceeded the advertised salary range to avoid a bidding war with two prestigious universities scheduled to interview Makoba[1] (App. A-3) because "qualified minority applicants, who are in short supply, can command premium salaries in the open

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[1] Those universities are Brandeis and Northwestern.

market." App. A-10-11. Farmer, on the other hand, received a starting salary within the advertised range of $31,000 with a $2,000 raise after the completion of her dissertation. This salary differential eventually widened to $10,838. App. A-3.

In January 1993, Yvette Farmer filed a complaint alleging, among other things, that the University had violated Title VII of the Civil Rights Act and the Equal Pay Act. App. A-3. A jury returned a verdict in her favor and awarded her $40,000 in damages. App. A-4. In a sharply divided opinion the Nevada Supreme Court reversed.

A. The Majority Opinion

Relying on *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979), the court below found that the University's preference program did not violate Title VII. First, the court held "[t]he university's attempts to diversify its faculty by opening up positions traditionally closed to minorities satisfies the first factor under *Weber*." App. A-7.[2] The court then turned to the second *Weber* factor and concluded that because the University's faculty was 87-89% white and only 1% black and because the University was attempting to attain, as opposed to maintain, a racial balance, its minority bonus preference policy did not "unnecessarily trammel the interests of white employees." *Id.* The court made this finding despite the fact that the University's unwritten policy does not define at what point its faculty becomes diverse enough.

Moreover, according to the court below, the University's desire to achieve a racially diverse faculty was sufficiently

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[2] Despite the majority's loose reference to the "traditionally segregated job categories" language of the *Weber* opinion, there is no evidence in the record that shows faculty positions at the University have been closed to minorities. As will be explained in greater detail *infra*, the University faculty is not marked by the type of "manifest imbalance" found in *Weber* and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

analogous to "the constitutionally permissible attainment of a racially diverse student body countenanced by the Bakke Court." App. A-7 (citing *Regents of the University of California v. Bakke*, 438 U.S. 265, 314-18 (1979) (opinion of Powell, J.). The court explained that the University had a compelling interest in achieving a racially diverse faculty and its unwritten minority bonus preference policy was designed to achieve this goal.

> A failure to attract minority faculty perpetuates the University's white enclave and further limits student exposure to multicultural diversity. Moreover, the minority bonus policy is narrowly tailored to accelerate racial and gender diversity. Through its affirmative action policies, the University has achieved greater racial and gender diversity.

App. A-7.

The court also ruled that the University's interest in promoting racial diversity was sufficient to save it from liability under the Equal Pay Act (EPA). 29 U.S.C. § 206(d). Under the EPA an employer may justify a differential in pay "based on any factor other than sex." 29 U.S.C. § 206(d)(1)(iv). After recognizing the conflict among the federal circuit courts over the meaning of the "factor other than sex defense," the court interpreted this provision as allowing an employer to demonstrate a business-related reason for the wage disparity. App. A-10. Applying this test, the court held that the University's desire to achieve a racially diverse faculty provided a bona fide business-related reason for the difference between Johnson Makoba's and Yvette Farmer's pay. "Clearly, the University had a bona fide business-related reason for attaining a racially diverse faculty." App. A-10.

For these reasons, the Nevada Supreme Court reversed the decision of the trial court. App. A-13.

B. Justice Springer's Dissent

A dissenting justice rejected the majority's interpretation of Title VII allowing the University to discriminate against Yvette Farmer based on her race. Citing to *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1547, Justice Springer explained, "Congress neither addressed nor embraced racial diversity 'for education's sake' as a purpose of Title VII, and nothing in federal case law, including the Supreme Court's equal protection cases, supports recognition of such a purpose." App. A-14 n.1. (Springer, J., dissenting). After determining that racial discrimination in the name of diversity did not satisfy Title VII's antidiscrimination mandate, Justice Springer turned to the vernacular, as well as the case law, of the Equal Protection Clause, finding "no authority" for the majority's assertion that "fostering a culturally and ethnically diverse faculty" was a sufficiently compelling reason to justify the University's discrimination against Yvette Farmer. App. A-13. Justice Springer based his decision on the Fifth Circuit's opinion in *Hopwood v State of Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

> After review of the relevant Supreme Court cases, I turn to Hopwood and conclude that the racially discriminatory action taken by the University is constitutionally impermissible. "Cultural and ethnic diversity" simply cannot justify the University's undisguised racial discrimination in the pursuit of a more racially heterogenous faculty.

App. A-14 (footnote omitted).

Justice Springer noted that the University "made no showing whatsoever that it had discriminated against blacks in hiring." App. A-14 n.2. In any event, "it is difficult to see how hiring a recent emigrant from Africa would be an appropriate

remedy for prior discrimination against black Americans." App. A-14 n.2.[3]

C. Petition for Rehearing

On January 29, 1997, Yvette Farmer filed a timely petition for rehearing in the Nevada Supreme Court. The petition requested the court below to reconsider its opinion in light of the opinion rendered by the Third Circuit Court of Appeals in *Taxman v. Piscataway*. On June 27, 1997, this Court granted the Piscataway School Board's petition for a writ of certiorari. *Piscataway v. Taxman*, 117 S. Ct. 2506. On November 21, 1997, it was announced that the Piscataway Board of Education and Sharon Taxman had reached a settlement and their case would not be heard by this Court. Louis Freedberg, *Race-Based Layoff Case Settled*, S.F. Chron., Nov. 22, 1997, at A1. The same day the *Taxman* settlement was announced, the Nevada Supreme Court denied Yvette Farmer's petition for rehearing. App. B-1. Yvette Farmer now files this petition for a writ of certiorari, requesting this Court to consider the issue of whether Title VII allows employers to base employment decisions such as hiring and compensation, on the race and gender of the applicants in the name of "diversity."

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decision of the Third Circuit Court of Appeals in *Taxman v. Board of Education of the Township of Piscataway*. In *Taxman* the court held that "[g]iven the clear antidiscrimination mandate of Title VII, a nonremedial affirmative action plan, even one with a laudable

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[3] Justice Shearing also dissented asserting that Yvette Farmer should have prevailed under her Equal Pay Act claim. App. A-15.

purpose, cannot pass muster." 91 F.3d at 1550. Stated differently, "there is no congressional recognition of diversity as a Title VII objective requiring accommodation." *Taxman*, 91 F.3d at 1558. The court below, rejected this reasoning, finding instead that the University's attempts to diversify its faculty satisfies the first factor in *Weber*. App. A-7. The court also stated that in its view, the University had a compelling interest in fostering a racially diverse faculty in order to expose its students to "a culturally and ethnically diverse faculty." *Id.* This view assumes that race is a valid proxy for cultural attributes, thereby stereotyping individuals on the basis of race. The significance of this conflict cannot be overstated: Citizens of Nevada have less protection under Title VII than do citizens of Delaware, New Jersey, and Pennsylvania. The meaning of the Civil Rights Act of 1964 should not be dependent upon the accident of geography. This Court should grant the petition to resolve the conflict over whether Title VII allows an employer to grant a nonremedial racial preference to promote racial diversity.

The court below has decided an important question of federal law that should be settled by this Court. The question presented by this case, whether Title VII allows an employer to take race into account for purposes other than remedying prior discrimination, has already been deemed compelling enough by this Court to warrant review. *Piscataway Township Board of Education v. Taxman*, 117 S. Ct. 2506. Although the *Taxman* case settled, the question presented by that case remains unsettled. This Court has not yet established "the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups." *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. at 642 (Stevens, J., concurring). This case presents this Court with an opportunity to establish a uniform rule regarding to what extent, if any, Title VII allows an employer to base employment decisions on race or gender for nonremedial purposes.

I

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE THE CONFLICT OVER WHETHER TITLE VII ALLOWS AN EMPLOYER TO GRANT A NONREMEDIAL RACIAL PREFERENCE TO PROMOTE RACIAL DIVERSITY

The decision below conflicts with the *Taxman* decision rendered by the Third Circuit Court of Appeals on the meaning of Title VII of the Civil Rights Act of 1964. Title VII provides:

> It shall be an unlawful employment practice for an employer--
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

The language of the statute appears to stand as an absolute bar to all racial discrimination in employment. However, in 1979 this Court held that Title VII does not prohibit all race-conscious employment decisions. *United Steelworkers of America v. Weber*, 443 U.S. at 193. In *Weber* this Court upheld a program that granted racial preferences because its purposes "mirror[ed] that of the statute" and it did not "unnecessarily trammel the interests of white employees." *Id.* at 208. In 1987, this Court reaffirmed the analytical framework established in *Weber*. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. at 627.

Both the Nevada Supreme Court and the Third Circuit have been called upon to determine whether Title VII, as interpreted by *Weber* and *Johnson*, allows an employer to discriminate on the basis of race to achieve a racially diverse workforce. These

two courts have reached diametrically opposed conclusions. The Nevada Supreme Court held that the University's interest in attaining a racially diverse faculty allowed it to discriminate against Yvette Farmer without running afoul of Title VII of the Civil Rights Act of 1964. App. A-7. In direct contrast, the Third Circuit ruled that Title VII does ***not*** allow an employer to grant a preference to one group or individual--while at the same time necessarily discriminating against another group or individual--on the basis of race to achieve a racially diverse workforce. *Taxman*, 91 F.3d at 1550.

Like both *Weber* and *Johnson*, *Taxman* involved a program that granted racial preferences. *Taxman* differed from these prior cases in that its racial preference program was not adopted to remedy a pattern of prior discrimination, but instead was implemented to achieve a racially diverse teaching faculty. In 1989, the Piscataway Board of Education was faced with the unenviable task of having to lay off a teacher in the business department at Piscataway High School. New Jersey law requires tenured instructors to be laid off in reverse order of seniority. There was a tie in seniority status between Sharon Taxman, who is white, and Debra Williams, who is black, both teachers having been hired on the same day nine years earlier. *Taxman*, 91 F.3d at 1551. In prior situations, the seniority tie was broken through a random selection process (such as drawing lots or drawing numbers out of a container). In this case, the board decided that there was educational value in preserving a racially diverse faculty and decided to retain Debra Williams who was the only minority teacher in the business department. Sharon Taxman was laid off and suit was filed against the board under Title VII.

Applying the *Weber* criteria, the Third Circuit, sitting *en banc*, held that "[w]hile the Court in Weber and Johnson permitted some deviation from the antidiscrimination mandate of the statute in order to erase the effects of past discrimination, these rulings do not open the door to additional non-remedial

deviations." *Taxman* 91 F.3d at 1558. The court considered whether the employer's interest in a racially diverse faculty mirrored the purpose of Title VII. The court noted that Title VII was enacted to achieve two primary goals: to end discrimination in the workplace and to remedy the segregation and underrepresentation of minorities caused by prior discrimination. According to the Third Circuit, neither of these interests were advanced by the board's decision to terminate Sharon Taxman's employment. "Thus, based on our analysis of Title VII's two goals, we are convinced that unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and, therefore, cannot satisfy the first prong of the Weber test." *Taxman*, 91 F.3d at 1557. The court also found that the board's policy violated the second prong of the *Weber* test. "In addition to containing an impermissible purpose, the policy 'unnecessarily trammels the interests of the [nonminority] employees.'" *Taxman*, 91 F.3d at 1565 (quoting in part *Weber*, 443 U.S. at 208).

The Third Circuit was not unanimous in its decision that Title VII prohibits an employer from using race for nonremedial purposes. Four judges dissented from this holding. Chief Judge Sloviter, in an opinion joined by Judges Lewis and McKee, argued that "the Board's purpose of obtaining the educational benefit to be derived from a racially diverse faculty is entirely consistent with the purposes animating Title VII and the Civil Rights Act of 1964." *Taxman*, 91 F.3d at 1527 (Sloviter, J., dissenting). Judge Scirica was of the view that Title VII did not prevent the school board "from preferring one equally qualified teacher over another for a valid educational purpose." *Taxman*, 91 F.3d at 1577 (Scirica, J., dissenting). Judge McKee, in a separate dissenting opinion, explained: "The majority's conclusion that affirmative action plans not limited to attempts to remedy past discrimination run afoul of Title VII simply ignores the legislative history that Weber and Johnson require us to consider." *Id.* at 1578 (McKee, J., dissenting).

Faced with the identical question addressed by the Third Circuit in *Taxman*, the Nevada Supreme Court reached the opposite conclusion. Starting with the *Weber* and *Johnson* analysis, the court below concluded that Title VII allows a university to discriminate on the basis of race to achieve a racially diverse faculty. The court stated its view that the attainment of a racially diverse faculty was "sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court." App. A-7.[4] The court then found the desire to achieve a racially diverse factually satisfied Title VII as interpreted by *Weber*. App. A-7. The court explained that the University had a compelling interest in attaining a racially diverse faculty because the failure to attract minority faculty limited student exposure to racial and ethnic diversity. *Id.*[5]

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[4] Where the *Farmer* court found the discussion in Justice Powell's opinion in *Bakke* regarding the desirability of a diverse student body "sufficiently analogous" to the University's desire to achieve a diverse faculty, the *Taxman* court expressly refused to rely on *Bakke* for the proposition that diversity is a permissible goal under Title VII.

> Bakke's factual and legal setting, as well as the diversity that universities aspire to in their student bodies, are in our view, so different from the facts, relevant law and the racial diversity purpose involved in this case that we find little in Bakke to guide us.

Taxman, 91 F.3d 1562. Not only are the lower courts divided on whether Title VII allows nonremedial preferences, they are unable to agree on the case law that should be used to guide their decision.

[5] Yvette Farmer did not challenge the University's unwritten minority bonus preference policy under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The court below did raise the issue and found that the plan "pass[ed] constitutional muster." App. A-7. The court concluded: "The University demonstrated that it has a compelling interest in fostering

(continued...)

Turning to the second prong of the *Weber* test the court below again diverged from the Third Circuit. The Nevada Supreme Court found that the University's minority bonus preference policy did not unnecessarily trammel the interests of white employees because white professors held 87-89% of the full time faculty positions, whereas black professors held only 1% of those posts. App. A-7. The court concluded that because the University's preference program conformed to both of the *Weber* prongs, Yvette Farmer's rights under Title VII had not been violated. *Id.*

The Nevada Supreme Court was not unanimous in its rejection of the *Taxman* decision. In dissent, Justice Springer cited *Taxman* with approval for the proposition that

> Congress neither addressed nor embraced racial diversity "for education's sake" as a purpose of Title VII, and nothing in federal case law, including the Supreme Court's equal protection cases, supports recognition of such a purpose.

App. A-14 n.2 (Springer, J., dissenting) (citing *Taxman*, 91 F.3d at 1558-63).

Justice Springer also rejected the majority's conclusion that diversity was a sufficiently compelling reason for intentional discrimination by Nevada's public university. App. A-14 ("'Cultural and ethnic diversity' simply cannot justify the University's undisguised racial discrimination in the pursuit of a more racially heterogeneous faculty."). *Id.* (footnote omitted).

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[5] (...continued)
a culturally and ethnically diverse faculty." App. A-7. This conflicts with the law of the Fifth Circuit where "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment." *Hopwood v. State of Texas*, 78 F.3d at 944.

As it now stands, the protections afforded by Title VII of the Civil Rights Act differ significantly depending on the jurisdiction were the suit is brought. In the Third Circuit, employers are prohibited from discriminating against employees (or potential employees) on the basis of race in order to achieve a racially diverse workforce. In Nevada, however, employees have no such protection, and can be denied employment if their prospective employer decides that it wishes to have a more racially diverse workforce. The two appellate courts that have addressed this issue have reached different conclusions. Future courts faced with this issue will be forced to chose between the reasoning of the Third Circuit and the reasoning of the Nevada Supreme Court which, of course, will only serve to exacerbate the current conflict of authority. This Court should grant the petition to resolve this critical issue currently dividing the lower courts.

II

THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER THE GOVERNMENT MAY GRANT RACE OR GENDER BASED PREFERENCES TO ACHIEVE NONREMEDIAL INTERESTS

The language of Title VII proscribes employment discrimination against any individual on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). This Court has previously allowed race and gender to be used in employment decisions in order to remedy the effects of prior discrimination. *Weber*, 443 U.S. 193, and *Johnson*, 480 U.S. 616. *Taxman*, 91 F.3d at 1558 (citing *Weber* and *Johnson*). This Court has not been provided an opportunity to determine whether Title VII permits employers to discriminate on the basis of race or gender for nonremedial purposes, such as diversifying a workforce. This case provides that opportunity.

A. The *Weber* and *Johnson* Decisions Permit Consideration of Race or Gender Only to Remedy Prior Discrimination

On two prior occasions this Court has reviewed voluntarily adopted employment practices that granted preferences to some employees, while at the same time discriminating against others. In neither of these cases, however, was the employer using race or gender in order to diversify its workforce.

In *Weber*, this Court addressed the legality of a voluntary racial preference program adopted by the Kaiser Aluminum & Chemical Corporation requiring 50% of the openings in an in-plant craft-training program be reserved for black employees, until the percentage of black craft-workers equaled the percentage of blacks in the local labor force. *Weber*, 433 U.S. at 198. Prior to the adoption of the plan, the local labor force was about 39% black whereas the craft-work force was less than 2% black. Not surprisingly, Kaiser denied that it had discriminated against blacks in the past, but did concede "that its past hiring practices may be subject to question." *Weber*, 443 U.S. at 210 (Blackmun. J, concurring). This Court upheld the Kaiser plan, finding that its remedial purpose "mirror[ed]" that of Title VII. *Weber*, 443 U.S. at 208.

In 1987, this Court considered another racial preference program under Title VII. In *Johnson*, the County of Santa Clara, California, adopted a gender based preference program based on its conclusion that "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons." *Johnson*, 480 U.S. at 260. Shortly thereafter, the county announced it would promote one of its current employees to the position of road dispatcher. Significantly, at the time this announcement was made, ***none*** of the 238 positions in this job

category was held by a woman. 480 U.S. at 636. Diane Joyce and Paul Johnson were two of the seven qualified finalists for the position. Diane Joyce was promoted and Paul Johnson sued. 480 U.S. at 625.

Concluding that the plan was designed to eliminate imbalances in traditionally segregated job categories, this Court held that the plan satisfied the first prong of the *Weber* test. *Johnson*, 480 U.S. at 637. This Court also held that the plan did not unnecessarily trammel the rights of male employees because gender was only a "plus" factor, Paul Johnson had no "firmly rooted expectation" of receiving the job, and although he was denied a promotion, he retained his position with the county. *Id.* at 638. Finally, the plan was "intended to *attain* a balanced work force, not to maintain one." *Id.* at 639 (emphasis in original).[6]

Weber and *Johnson* allowed employers to deviate from the plain language of Title VII and utilize race and gender discrimination in employment decisions because the plans challenged in those cases mirrored the purposes of the statute--the remediation of past discrimination. However, while authorizing the discriminatory actions taken in those cases this Court made no attempt to define the limits on discriminatory

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[6] In *Johnson*, this Court held that a public employer's obligations under Title VII were not identical to their constitutional obligations. *Johnson*, 480 U.S. at 627 n.6. Four justices, however, rejected this idea. "In my view the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause." *Johnson*, 480 U.S. at 649 (O'Connor, J., concurring). In addition, Justice Scalia, joined by Justice White and Chief Justice Rehnquist, stated "it is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution." *Id.* (Scalia, J., dissenting). This case presents this Court with an opportunity to revisit the issue of whether Title VII requires a public employer to satisfy the requirements of the Constitution.

employment decisions authorized by Title VII. "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action programs." *Weber*, 443 U.S. at 208. "[T]he opinion does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups." *Johnson*, 480 U.S. at 642 (Stevens, J., concurring). This case provides an ideal vehicle to provide further definitions to "the line of demarcation between permissible and impermissible" race and gender based employment decisions.

B. This Court Should Decide Whether Title VII Allows Employers to Discriminate on the Basis of Race to Achieve Diversity

As the Third Circuit recently explained, *Weber* and *Johnson* allow for new preference plans "to erase the effects of past discrimination, ***these rulings do not open the door to additional non-remedial deviations.***" *Taxman*, 91 F.3d at 1558 (emphasis added).

This Court should grant this petition to determine whether nonremedial racial preferences, such as the one utilized by the University in this case, are permissible under Title VII. This issue was squarely presented by the *Taxman* case. There, "[t]he Board's affirmative action policy did not have 'any remedial purpose.'" *Taxman*, 91 F.3d at 1550. Unfortunately, that case settled before this Court had an opportunity to address this important issue. That issue, however, is presented by this case.

In this case the University is not attempting to remedy the effects of its own past discrimination. As Justice Springer observed "this is not a case of remedial affirmative action." App. A-14 n.2. (Springer, J., dissenting). There is "no showing whatsoever that the University has discriminated against minorities in hiring." *Id.* Moreover, it is difficult to see how hiring a recent emigrant from the nation of Uganda would in any

way remedy prior discrimination against American racial minorities. *Id.*

Nor does this case involve the type of conspicuous imbalance of racial minorities or women that was at issue in both *Weber* and *Johnson*. In *Johnson*, this Court held that under Title VII an employer need not point to its own prior discriminatory practices or even evidence of an "arguable violation" by the employer. *Johnson*, 480 U.S. at 630. However, an employer was required to show a "conspicuous imbalance in traditionally segregated job categories." *Id.*

Although this Court has not yet clarified what "statistical imbalance" is necessary to justify a race-conscious remedial preference under Title VII,[7] it is clear that none of the glaring statistical disparities present in *Weber* and *Johnson* are present in this case. In *Weber* 39% of the local labor force was black while only 1.83% of the crafts-work force at the Kaiser plant was black. *Weber*, 443 U.S. at 210. The employer in question in *Weber* also conceded that its past hiring practices "may be subject to question." *Weber*, 443 U.S. at 209 (Blackmun, J., concurring). In *Johnson*, none of the 238 positions in the applicable job category was held by a woman. *Johnson*, 480 U.S. at 621. Moreover, the County's hiring statistics demonstrated that women were "concentrated in traditionally female jobs." *Id.* at 634.

Here, by contrast, between 1989 and 1991, 87% to 89% of the full-time faculty at the University were white. The 1990 United States Census shows that the City of Reno was 86% white and the State of Nevada was 88.3% white. *United States Bureau of the Census Population Paper Listing 49, Population*

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[7] "Unfortunately, the Court today gives little guidance for what statistical imbalance is sufficient to support an affirmative action plan." *Johnson*, 480 U.S. at 652 (O'Connor, J., concurring).

of States by Race and Hispanic Origin, April 1, 1990.[8] The University's faculty is nearly a mirror image of the surrounding community served by the University. Although 1% of the University's faculty was black between 1989 and 1991, the 1990 census reveals that the City of Reno was only 2.8% black. The racial composition of the University's full-time faculty closely resembles the average racial balance of institutions of higher learning in the United States. Between 1989 and 1991, 87-89% of the University's full-time faculty was white, whereas in 1992, 86.8% of the full-time instructional faculty and staff in institutions of higher learning in the United States was white. United States Department of Education, *Digest of Educational Statistics 1995*, at 231. Certainly the racial composition of the University's full-time faculty reflects the racial makeup of the City of Reno, the State of Nevada, and the average of all United States institutions of higher learning. This hardly rises to the level of a "conspicuous imbalance" that the Court found in *Weber* and *Johnson*.[9]

Moreover, as this Court has explained on a number of prior occasions, in determining whether an imbalance exists the

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[8] The Census includes persons of Hispanic origin as "white."

[9] The use of statistics to measure racial diversity raises an interesting question: At what point does the University's faculty become diverse enough? As the district court observed: "Is a diverse faculty one which is 10% minority, 20% minority, or 50% minority?" *United States v. Board of Education of the Township of Piscataway*, 832 F. Supp. 836, 850 (D.N.J. 1993). Here the University faculty was composed of between 13% and 11% full-time minority faculty members. App. A-2. Is there some threshold the University will eventually cross when it becomes diverse enough to stop using racial preferences in its hiring decisions? Or will the University be able to make race based employment decisions in perpetuity to increase the diversity of its faculty? The University's unwritten policy makes no attempt to answer this question and does not specify at what point its faculty becomes diverse enough.

relevant comparison is between the percentage of minorities in the employer's workforce and the percentage of minorities in the area labor force, or the general population, who possess the requisite qualifications.

> Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. *See Hazelwood School District v. United States* (citations omitted) (must compare percentage of blacks in employer's work ranks with the percentage of qualified black teachers in area labor force in determining underrepresentation in teaching positions).

Johnson, 480 U.S. at 632.

As the Court below explained, there is "a perceived shortage of black Ph.D. candidates." App. A-3. "It is undisputed that qualified minority applicants, who are in short supply, can command premium salaries in the open market." App. A-10. Comparing the University's faculty with those members of the "labor force who possess the relevant qualifications" demonstrates that the University is not scarred by the type of manifest imbalance present in *Weber* and *Johnson*.

In *Weber* this Court reviewed an industry where black workers were unwelcome. "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper ground for judicial notice." *Weber*, 443 U.S. at 198 n.1. Here the opposite is true. As the Nevada Supreme Court explained, "the University justified its premium offer as a method of preventing a bidding war between two prestigious universities slated to interview Makoba." App. A-2. Faced with the shortage of qualified minority applicants and a desire to diversify its faculty the University deemed it necessary to pay its black professors significantly more than their white counterparts. (Johnson Makoba started at $35,000 with an

increase to $40,000 upon the completion of his dissertation. In contrast, a year later, Yvette Farmer started at $31,000 with an increase to $33,000 upon the completion of her dissertation, even though she performed the same job as Mr. Makoba.) This is simply not a case where the University is attempting to remedy its own past discrimination or correct a conspicuous racial imbalance caused by the effects of past discrimination. Instead, the University hired Johnson Makoba and then paid him a premium salary in order to avoid an "all-out bidding war with other educational institutions." App. A-11.

The heart of the court's opinion makes it clear that the University initially hired Johnson Makoba and not Yvette Farmer because it wished to diversify its teaching faculty.

> The University demonstrated that it has a compelling interest in fostering a culturally and ***ethnically diverse faculty***. A failure to attract minority faculty perpetuates the University's white enclave and further limits student exposure to ***multicultural diversity***. Moreover, the minority bonus policy is narrowly tailored to accelerate ***racial and gender diversity***. Through its affirmative action policies, the University achieved greater ***racial and gender diversity*** by hiring Makoba and Farmer.

App. A-7. (emphasis added).

In direct conflict with the Third Circuit in *Taxman*, the Nevada Supreme Court squarely held that the University's attempts to diversify its faculty satisfy the first prong of the *Weber* test. App. A-7. This expansion of *Weber* and *Johnson* should be reviewed by this Court. Allowing an employer to circumvent the plain language of Title VII in order to acquire a "diverse" workforce would become the exception that swallows the rule. An employer will always be able to claim that in order to diversify its workforce, it must hire (or promote) based on the race of the applicants. Racial diversity is an amorphous goal

with no measurable meaning. There simply is no discernible line where a workforce is magically transformed from a nondiverse workforce into a diverse workforce. Instead, an employer can always claim that it wishes to make its workforce ***more*** diverse than it already is. Armed with this rationale any employer could escape liability under Title VII.

C. This Court Should Decide Whether Preferences Given to Achieve Diversity Unnecessarily Trammel the Rights of Other Employees

Both *Weber* and *Johnson* teach that in order for a racially discriminatory policy to survive scrutiny under Title VII the plan must not "unnecessarily trammel the interests of white employees." *Johnson*, 480 U.S. at 630 (quoting *Weber*, 443 U.S. at 208). In addition, such a plan must be a "temporary measure." *Weber*, 443 U.S. at 208. The Third Circuit in *Taxman* has already concluded that a plan designed to achieve racial diversity unnecessarily trammels the rights of nonminority employees.

In *Taxman*, the court was struck by the Piscataway plan's lack of definition and structure.

> [T]he Board's policy, devoid of goals and standards, is governed entirely by the Board's whim, leaving the Board free, if it so chooses, to grant racial preferences that do not promote even the policy's claimed purpose. Indeed, under the terms of this policy, the Board, in pursuit of a "racially diverse" work force, could use affirmative action to discriminate against those whom Title VII was enacted to protect. Such a policy unnecessarily trammels the interests of nonminority employees.

Taxman, 91 F.3d at 1546.

In this case, the University's unwritten minority bonus preference policy suffers from the same defect. Here, the

program, coupled with the University's current desire to achieve a racially diverse faculty, was used to favor a black man over a white woman. The desire to achieve a diverse faculty could just as easily been used to favor a female applicant over a male applicant. Between 1989 and 1991 the University's full-time faculty was 87 to 89% white, while the surrounding community was 86% white. During this same time period, 25 to 27% of the full-time faculty were women. Logic would dictate that roughly 50% of the surrounding community was female. University administrators could have decided to increase gender diversity at the University thereby favoring female applicants over male applicants. Under the Nevada Supreme Court's rationale, "diversity" is available as a talisman to make legal any refusal to hire any individual because of the individual's race, color, religion, sex, or national origin. This rationale eviscerates the protections of Title VII.

The Nevada Supreme Court expanded the holdings of *Weber* and *Johnson* in another significant way that warrants review by this Court. Both *Weber* and *Johnson* involved promotion decisions. In each case, this Court found it significant that although Brain Weber and Paul Johnson were not promoted, they did not lose their existing jobs. *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 639. Because they remained eligible for other promotions their rights were not unnecessarily trammeled.

In this case, although Yvette Farmer was eventually hired, the University continued to discriminate against her in order to maintain its racially diverse faculty. Johnson Makoba, a black male professor of sociology received a premium over and above the advertised salary for the position of $35,000 a year and a $5,000 increase upon the completion of his dissertation. Yvette Farmer, a white female professor of sociology, received a starting salary within the advertised range of $31,000 and was given only a $2,000 increase after her dissertation was completed. App. A-3. The wage disparity eventually widened

to $10,838. *Id.* Yvette Farmer challenged this pay disparity under both Title VII and the Equal Pay Act. *Id.* The Nevada Supreme Court rejected this challenge finding that the University's interest in attaining a racially diverse faculty allowed it to pay Yvette Farmer significantly less money than Johnson Makoba. Addressing the claim under the Equal Pay Act, the court below held that the University had a bona fide business related reason for attaining a racially diverse workforce and that the pay "differential was based on a factor other than sex." App. A-11 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974)).

In other words, so long as a university (or, presumably, any employer) desires to achieve a racially diverse workforce it can pay its employees different wages for the same work based on immutable characteristics without running afoul of the EPA or Title VII. Here the University paid a white female professor significantly less than a black male professor, and the court below validated this dual pay scale. Under this reasoning, the perceived need for racial diversity, or more racial diversity, becomes an absolute defense to any claim brought pursuant to the EPA or Title VII. Surely Congress did not intend for liability under either Title VII or the EPA to be so easily avoided. The University's dual pay system goes far beyond the plans ratified by this Court in *Weber* and *Johnson*.

Finally, unlike the plans at issue in *Weber* and *Johnson*, the pay differential here is not a "temporary" measure, but instead would presumably last as long as both Yvette Farmer and Johnson Makoba remain at the University. The University has not defined at what point its faculty will become sufficiently diverse. In the absence of any benchmark for measuring when a faculty becomes diverse, the University's affirmative action program has no "logical stopping point." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275 (1986).

CONCLUSION

In departing from the plain language of Title VII, in *Weber*, this Court was careful to emphasize the narrowness of its opinion. *Weber*, 443 U.S. at 200. In *Taxman* the Third Circuit expressed its reluctance to expand the situations where employers may use race, gender, or other immutable characteristics to make employment decisions. *Taxman*, 91 F.3d at 1558. The Nevada Supreme Court, on the other hand, has refused to proceed with such caution. Instead, that court has rendered a decision that invites an employer to use race in any employment decision without running afoul of Title VII, so long as the employer claims that the race based decision was necessary to increase diversity. Given the importance of this issue, and the conflict of authority it is generating, the petition for a writ of certiorari should be granted.

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